

FILE COPY  
OFFICE OF THE CLERK, U. S. SUPREME COURT  
APR 15 1944  
U. S. SUPREME COURT CLERK

---

# Supreme Court of the United States

OCTOBER TERM, 1943

• No. 779

37

TOM TUNSTALL

BROTHERHOOD OF LOCOMOTIVE  
FIREMEN AND ENGINEMEN,  
and OTHERS

---

BRIEF FOR NORFOLK SOUTHERN RAILWAY  
COMPANY OPPOSING GRANTING  
CERTIORARI

---

JAS. G. MARTIN,

500 Western Union Building, Norfolk, Va.

*Counsel*

## SUBJECT INDEX

*Page*

Petition, brief, and record not delivered in ten days after filing.....	1
Necessary party not before the Court.....	1
No federal question involved in the case.....	2

# Supreme Court of the United States

OCTOBER TERM, 1943

**No. 779**

**TOM TUNSTALL**

**v.**

**BROTHERHOOD OF LOCOMOTIVE  
FIREMEN AND ENGINEMEN,  
and OTHERS:**

## **BRIEF FOR NORFOLK SOUTHERN RAILWAY COMPANY OPPOSING GRANTING CERTIORARI**

1. At the outset we submit that the Court should not take jurisdiction because the notice of filing of petition with printed copies of petition, brief, and record were not served within ten days from March 10, 1944, the date the petition was filed; but on the contrary not until March 31, 1944; as required by Rule 38 of this Court, Subsection 3.

2. Furthermore, we submit that there is no jurisdiction because an absolutely necessary party, to-wit, Brotherhood of Locomotive Firemen and Enginemen, never was brought before the District Court nor the Circuit Court of Appeals by service of any process

nor by any appearance and this objection was made from the very beginning in the District Court. See Record page 34.

That there was no service upon said Brotherhood is positively shown by the return of the Marshal, record page 53, reading "Returned not executed as to Brotherhood of Locomotive Firemen and Enginemen, no representative in this District."

Both the District Court and the Circuit Court of Appeals having decided in favor of defendants on the ground that no federal question was involved, in their opinions have totally ignored the matter of said Brotherhood, a necessary party, not being before the Court; although the final order of the District Court (Record page 50) stated that said Brotherhood had been duly served in the face of the Marshal's return to the very contrary. The petition for certiorari and the brief in support thereof also totally ignore the question of said Brotherhood being served with process.

To have the necessary parties before the Court being a condition precedent to jurisdiction on other questions, we submit that the want of that party before the Court prohibits jurisdiction and makes refusal of the certiorari necessary.

3. If it can be imagined that this case is before this Court in time, and that the necessary parties are before the Court, still this Court has no jurisdiction and the certiorari should be refused because there is no federal question before the Court.

That there is no federal question is so thoroughly shown by the opinion of the District Court (record

page 36), and by the opinion of the Circuit Court of Appeals (record page 55), that we think it would make "vain repetitions" (Matthew VI, 7) for us to quote from the many cases emphatically establishing that no federal question is involved. We call especial attention to the cases cited by the Circuit Court of Appeals (record pages 56, 57).

We respectfully submit that certiorari should be refused.

JAS. G. MARTIN,

500 Western Union Building, Norfolk, Va.

*Attorney for Norfolk Southern  
Railway Company.*